89- 1427

No.: _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1989

HERBERT PATE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

APPENDIX

	PAGE
Memorandum of Decision and Order of United States District Court for the Eastern District of New York, dated February 16, 1988	1A-13A
Order of the United States Court of Appeals for the Second Circuit, dated July 28, 1988	14A-15A
Order of the United States Court of Appeals for the Second Circuit, dated October 5, 1988	16A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

-against-

HERBERT PATE,

Defendant.

CR 86-00415

Memorandum of Decision and Order

- X

February 16, 1988

A P P E A R A N C E S :

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MISHLER, District Judge

On September 8, 1986, defendant Herbert Pate pled guilty to six counts of a superceding information charging:

(1) evasion of income taxes for the calendar year 1983 (26 U.S.C. Section 7201);

(2) devising a scheme and artifice to defraud the Federal Insurance Company (18 U.S.C. Section 1343);

(3) possessing a firearm (a Browning 9 mm pistol) on or about May 28, 1986 while released on bail having previously been convicted of felonies (18 U.S.C. App. II, Section 1202(a)(1) and 18 U.S.C. Section 3147;

(4) possessing a firearm (a silencer) on or about May 28, 1986, while released on bail, which silencer was not registered in the National Firearms Registration and Transfer Record (18 U.S.C. Section 5861(d) and 5871 and 18 U.S.C. Section 3147);

(5) possessing a firearm (a .45 caliber semi-automotic rifle) on or about May 28, 1986, while released on bail (18 U.S.C. App. II, Section 1202(a)(1) and 18 U.S.C. Section 3147;

(6) storing and concealing expolsive material (12 U.S. Militarv M-7 non-electric blasting caps) on May 28, 1986 while released on bail. (18 U.S.C. Sections 842(h), 844(a) and 18 U.S.C. Section 3147).

Prior to sentencing the court advised the defendant "that on counts three, four, five and six . . . there were minimum terms of two years and that all the terms of imprisonment must be consecutive to any other sentence or

imprisonment." (Transcript at 7). "As I view it, that means for those four sentences, that each sentence must be consecutive to every other sentence I impose and the sentence on each of the crimes must be for not less than two years." (Transcript at 10-11).

In response to Gerald L. Shargel, Esq., defendant's attorney's statement, that in his discussions with the defendant the plea agreement provided for a total maximum term of imprisonment of 25 years, the court explained its desire to avoid any confusion with the probability of early release on parole. The court said that the defendant may be thinking that he "may only have to serve a year or two. I am saying to him in making this offer of a plea, the way I interpret it, the section (Section 3147) forget about getting out in two years, or four years or six years or eight years. Because they (the Parole Commission) may very well interpret the section as meaning that each term just be served separately for

at least two years and each sentence consecutive to each other." (Transcript at 12.)

The court imposed the following prison terms: [1]/

Count One	-	1 year
Count Two	-	1 year to run concurrently with the term imposed in Count One.
Count Three	-	2 years - consecutive to the terms imposed in Counts One and Two.
Count Four	-	3 years - consecutive to the terms imposed in Counts One, Two and Three.
Count Five	-	3 years - consecutive to the terms imposed in Counts One, Two, Three and Four.
Count Six	-	3 years - consecutive to the terms imposed in Counts One, Two, Three, Four and Five.

The court imposed prison terms totalling 12 years, or 11 years, of the three year terms imposed under Counts Four, Five and Six may be considered the mandatory minimum for parole purposes.

Defendant now moves pursuant to Fed. R. Crim. P. 35(a) to vacate the sentence imposed in Counts Three, Four, Five and Six on the ground that they were illegally imposed. "[T]he Court pronounced sentence under the misapprehension that it had to impose a two year minimum enhanced term. . . . " (Defendant's Memorandum at 5).

DISCUSSION

The defendant claims that the sentences imposed in Counts Three, Four, Five and Six must be vacated because the court, in sentencing defendant understood that 18 U.S.C. Section 3147 required the imposition of a mandatory minimum term of two years. Defendant claims that in light of the Supreme Court opinion in Rodriquez he was misinformed about the lowest sentence the court could impose under Section 3147 and therefore the sentence should be vacated.

As a second ground for resentencing, defendant claims that Section 3147 only requires

that the court impose a single enhanced sentence for Counts Three, Four, Five and Six rather than four separate Section 3147 terms. Finally defendant asserts that Counts Three and Five constitute a single offense and that the court's imposition of consecutive sentences for these counts was improper.

I. Rodriquez Does Not Require That Defendant's Sentence Be Vacated

Because the motion is based in part on a claim of misconception of the authority of the court, we deem it proper to reveal the considerations of the court as to the appropriate sentence to impose on the defendant. In accordance with the practice and procedure in this district in which a sentencing panel of two judges offers an advisory opinion of the appropriate sentence, we tentatively considered the following sentence:

Count One	-	2 years ± $10,000 fine.
Count Two	-	1 years ± $ 1,000 fine.
Count Three	-	2 years ± $250,000 fine.
Count Four	-	3 years ± $250,000 fine.
Count Five	-	3 years ± $250,000 fine.
Count Six	-	3 years ± $250,000 fine.

All the prison terms to be served consecutively for a total of 15 years. The fines cumulative in the amount of $1,011,000. Assessment of $300 pursuant to 18 U.S.C. Section 3012. [2]/

At the time of sentenceing, November 6, 1986, this court was bound by the Second Circuit Court of Appeals' interpretation of 18 U.S.C. Section 3147 as rendered in United States v. Rodriquez, 794 F.2d 24 (2d Cir. 1986) (decided June 19, 1986). In vacating a sentence which granted probation under Section 3147, the Second Circuit Court of Appeals held that under 18 U.S.C. Section 3147 a two year minimum term was mandated; the Circuit Court directed the district judge to resentence the defendant. Certiorari was granted in the case. The Supreme Court in United States v. Rodriquez, __U.S.__, 107 S.Ct. 1391 (1987) reversed the Second Circuit and held that although Section 3147 required

that a defendant be sentenced to a minimum term of two years the section did not withdraw the sentencing judge's authority to "suspend the imposition or execution of sentence and place the defendant on probation. . . . " 18 U.S.C. Section 3651.

In United States v. Mudd, 817 F.2d 840 (D.C. Cir. 1987) the District Court sentenced the defendant to a prison term of two years believing that under Section 3147 a mimimun term of two years was mandatory. The case came up for review before the D.C. Circuit Court of Appeals following the Supreme Court decision in Rodriquez. The Circuit Court found that the reasoning in Rodriquez gave the sentencing judge the right to consider early parole in sentencing under 18 U.S.C. Section 4205(b) (Repealed, Effective November 1, 1987). The court did not vacate the sentence imposed but simply remanded "the case to allow the district court to consider the appropriateness of probation or early parole." Id. at 844.

In United States v. Patterson, 820 F.2d 1524 (9th Cir. 1987), the defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. App. Section 1202(a). The district judge sentenced Patterson to six months under Section 1202(a) and enhanced the punishment by adding two years pursuant to Section 3147 because Patterson committed the firearm offense while he was released on bail pending appeal on prior felony convictions. The court held "that 18 U.S.C. Section 3147 does not create a separate offense. Section 3147 is a sentence enhancement statute which simply mandates an enhanced sentence for someone who commits an offense while released on bail." Id. at 1526. Here again the Circuit Court did not vacate the sentence; nor did it remand the case to the district court. The Circuit Court affirmed.

Accordingly, we find that the sentencing in this matter was proper and that we are not required in light of the Court's decision in

Rodriquez to vacate the sentencing imposed. The aggregate sentence was one within our discretion. It was not imposed solely in consideration of our interpretation of Section 3147 and the sanctions mandated by the statute.

In addition, the court advised the defendant of the harshest result possible under his plea in considering release on parole. The court's statement, "Forget getting out in two years, four years, or six years or eight years. Because they (the Parole Commission) may very well interpret the section as meaning each crime must be served separately at least two years and each sentence consecutive to each other." We do not have before us the issue of the date that Pate becomes eligible for release on parole under the sentences imposed.

II. Section 3147 Requires That Each Sentence Term be Enhanced

Defendant challenges the authority of the court to impose consecutive Section 3147

enhancement sentences in Counts Three, Four, Five and Six. The argument appears to be that, in imposing the consecutive sentences, the minimum terms required under Section 3147 could not be considered a total mandatory minimum term of eight years (or eleven years, if the three year terms imposed under Counts Four, Five and Six are considered to be mandatory minimum terms for parole purposes) thereby denying Pate eligibility for release on parole until after service of one-third of the term imposed, i.e, four years. Rather, defendant argues that Section 3147 only requires that the court impose one enhanced Section 3147 sentence to run consecutive to any other sentences that may be imposed for the substantative crimes.

Section 3147 of Title 18 of the United States Code states:

> [a] person convicted of an offense committed while released under this chapter . . . shall be sentenced, in addition to the sentence prescribed for the offense, to --

> (1) a term of imprisonment of not less than two years . . . if the offense is a felony . . . .

We find that the clear and unambiguous language of the statute contradicts defendant's argument that Section 3147 requires the court to impose only one enhanced sentence. Thus, we find defendant's second argument is without merit.

III. Counts Three and Five Constitute Separate Offenses

Finally, Pate argues that the consecutive sentences imposed on Counts Three and Five should be vacated because the offenses charged constitute only one offense. (Defendant's Memorandum of Law at 15). We find that Pate's possession of firearms at separate residences constitute separate possessions for purposes of 18 U.S.C. App. Section 1202(a)(1) and that the court properly imposed consecutive sentences for these two distinct offenses.

CONCLUSION

We have reconsidered the sentences imposed with the clear understanding that probation

was a permissible alternative under Section 3147 and the possibility that Pate may not be eligible for release on parole until he shall have served eleven years of his sentence. On reconsideration, the motion is in all respects denied, and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

FOOTNOTES

1/ In addition, the court imposed fines totalling $411,000 and assessments under 18 U.S.C. Section 3013 totalling $300.

2/ Under the practice employed in this district in the use of a sentencing panel, the sentencing judge first notes his or her tentative sentence. The two advisory judges then submit their suggested sentence. One judge recommended "15 years plus $500,000 fine, the other judge recommended "Plea Agreement 20 years and maximum fines."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 28th day of July, one thousand nine hundred and eighty-eight.

PRESENT:

HON. FRANK X. ALTIMARI
HON. J. DANIEL MAHONEY,
Circuit Judges
HON. EDWARD R. KORMAN,
District Judge.*

- X

UNITED STATES OF AMERICA,

Appellee,

-v-

88-1097

HERBERT PATE,

Defendant-Appellant.

- X

Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

*Hon. Edward R. Korman, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

IN CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment appealed from is AFFIRMED.

Appellant appeals from an order denying his motion pursuant to Fed. R. Crim. P. 35(a) to correct an illegal sentence entered in the United States District Court for the Eastern District of New York (Mishler, J.). Having considered the arguments of counsel in light of the transcript of record, we affirm the order of the district court for substantially the reasons set forth in Judge Mishler's opinion.

HON. FRANK X. ALTIMARI

HON. J. DANIEL MAHONEY
Circuit Judges

HON. EDWARD R. KORMAN,
District Judge.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of October, one thousand nine hundred and eighty-eight.

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UNITED STATES OF AMERICA,

Appellee,

v

DOCKET NUMBER
88-1097

HERBERT PATE,

Appellant.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk